BUREAU OF LAND MANAGEMENT
v.
DAVID AND BONNIE ERICSSON

IBLA 86-105 Decided July 7, 1987

Appeal from a decision of Administrative Law Judge L. K. Luoma denying application for award of attorney's fees and expenses. AZ-020-3-245, AZ-020-81-2.

Affirmed as modified.

1. Equal Access to Justice Act: Adversary Adjudication -- Grazing Permits and Licenses: Adjudication

   Where BLM seeks to assess trespass damages and to take related action, including cancelling existing authorized grazing use, on the basis of charges that the permittee has grazed excess numbers of cattle in trespass on public land, followed by a hearing and appeal to the Board, BLM will be considered to have engaged in an adversary adjudication within the meaning of sec. 203(a)(1) of the Equal Access to Justice Act, as amended, 5 U.S.C. § 504 (Supp. III 1985).

2. Equal Access to Justice Act: Application -- Equal Access to Justice Act: Awards -- Grazing Permits and Licenses: Adjudication

   An application for an award of attorney's fees and expenses is properly denied where, although the applicant is the prevailing party in an adjudication of trespass charges and related action taken by BLM, BLM's decision to pursue such a course of action was substantially justified by circumstantial evidence pointing to a trespass on public land.

APPEARANCES: Michael S. Rubin, Esq., Phillip Weeks, Esq., Phoenix, Arizona, for appellants.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

David and Bonnie Ericsson have appealed from a decision of Administrative Law Judge L. K. Luoma, dated September 27, 1985, denying their application

for the award of attorney's fees and expenses pursuant to section 203(a)(1) of the Equal Access to Justice Act (EAJA), as amended, 5 U.S.C. § 504 (Supp. III 1985).

This case stems from appellants' successful defense to trespass charges initially brought by the District Manager, Phoenix District Office, Arizona, BLM, on March 12, 1981, with the issuance of an order to show cause before an Administrative Law Judge why appellants should not be held liable for $423,835.88 in trespass damages because of repeated and willful unauthorized grazing use (totaling 33,276 AUM's (animal unit months)) on public land during the grazing years 1976-1980. In that order, BLM also required appellants to show cause why their district grazing permits and grazing preference should not be cancelled and why they should not be barred from thereafter holding a grazing permit and grazing preference on BLM-administered public lands. This trespass case was docketed as AZ-020-3-245. On March 27, 1981, the District Manager rendered a final decision denying appellants' 1981 district grazing applications, suspending appellants' 1981 grazing permit for the Santa Maria Community Allotment indefinitely pending resolution of the trespass case, and requiring appellants to remove their livestock from district grazing allotments. On April 27, 1981, appellants appealed from the District Manager's March 1981 final decision. This case was docketed as AZ-020-81-2.

Appellants' two cases were consolidated and a hearing was held before Judge Luoma from July 13-21, 1981, in Phoenix, Arizona. 1/ In a decision dated February 8, 1982, Judge Luoma concluded that the basic question underlying each case was whether appellants had in fact grazed cattle on public land during the grazing years 1976-1980 in numbers in excess of that authorized by BLM. He held, after reviewing the evidence, that BLM had failed to sustain its burden of proving by reliable, probative, and substantial evidence that appellants had grazed excess numbers of cattle in trespass on public land, in view of the lack of eyewitness testimony in support of BLM's position and contrary credible evidence to the effect that the cattle were grazed on adjacent private land. Judge Luoma then dismissed the trespass case and vacated the District Manager's March 1981 final decision. BLM appealed to the Board.

In BLM v. Ericsson, 88 IBLA 248 (1985), we affirmed Judge Luoma's February 1982 decision. We concluded, despite a contrary assertion by BLM, that Judge Luoma had, in accordance with 5 U.S.C. § 556(d) (1982), correctly assigned the ultimate burden of persuasion on the charges of trespass to BLM. We next concluded that BLM was not aided in satisfying its burden by the presumption that a trespass on public land has occurred where a particular landowner has livestock on private land with unrestricted access to the public land and there is some evidence of actual trespass, citing Holland Livestock

1/ At the hearing, BLM on two occasions amended its March 1981 order to show cause, thereby reducing the extent of alleged unauthorized use to 25,228 AUM's and the corresponding trespass damages to $321,462.68.

Ranch v. United States, 714 F.2d 90 (9th Cir. 1983). We based this conclusion on the fact that "no actual trespass by Ericsson cattle was shown." BLM v. Ericsson, supra at 257. Finally, we concluded that Judge Luoma had, despite BLM assertions to the contrary, implicitly found, based upon all of the evidence adduced and his assessment of the credibility of the witnesses, that appellants' excess numbers of cattle were not grazed in trespass on public land but, rather, on adjacent private land. However, in order to clarify that implicit finding, we explicitly made a finding to that effect based upon our independent analysis of the record.

On March 10, 1982, following Judge Luoma's February 1982 decision and while the prior case was on appeal to the Board, appellants filed an application under section 203(a)(1) of the EAJA for attorney's fees and expenses, totalling $51,542.91, incurred in responding to BLM's March 1981 order to show cause and the District Manager's March 1981 final decision. Appellants asserted in the EAJA application that they are entitled to an award of attorney's fees and expenses as the "prevailing party" in an "adversary adjudication," where BLM had not been substantially justified in concluding that excess numbers of their cattle had grazed in trespass on public lands and the other criteria for an award were satisfied. Appellants also submitted a March 9, 1982, affidavit of Phillip Weeks, Esq., an attorney in the law firm which represented appellants, who attested to the attorney's fees and expenses incurred by appellants, as well as attached exhibits detailing the hours expended and the expenses incurred.

In a March 19, 1982, letter to appellants' attorney, Judge Luoma, noting that the case was on appeal to the Board, stated that he would hold appellants' EAJA application "in abeyance at least until the Secretary issues regulations implementing the Equal Access to Justice Act" because such regulations might preclude him "from acting on the application until that board has rendered its final decision." Regulations implementing section 203(a)(1) of the EAJA were promulgated effective April 25, 1983. See 48 FR 17596 (Apr. 25, 1983). The Board's decision in BLM v. Ericsson was issued on September 4, 1985.

In his September 1985 decision, Judge Luoma denied appellants' application because the regulations implementing section 203(a)(1) of the EAJA, codified at 43 CFR 4.603(a), provided that the rules regarding awards of attorney's fees and expenses did not apply in the case of adversary adjudications which were not required by statute to be determined on the record after opportunity for an agency hearing. Judge Luoma concluded that the regulations thus precluded an award under section 203(a)(1) of the EAJA where the "trespass action" arose under the Taylor Grazing Act, as amended, 43 U.S.C. §§ 315-315o-1 (1982), and the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1701-1784 (1982), which "do not contain the magic words saying in effect that 'hearings will be conducted upon notice and on the record in accordance with 5 U.S.C. 554'" (Decision at 2, 4). While finding that the regulations fly in the face of a clear reading of section 203(a)(1) of the EAJA, which contains no such limitations on the applicability of the statute, Judge Luoma concluded that he was bound by Departmental regulations.

In their statement of reasons for appeal, appellants contend that Judge Luoma improperly denied their EAJA application because the administrative proceeding involved herein constituted an "adversary adjudication" as defined in section 203(a)(1) of the EAJA. They further assert that, given Judge Luoma's interpretation of the regulation, 43 CFR 4.603(a) is contrary to the statute and, therefore, void citing Ellis v. United States, 610 F.2d 760 (Ct. Cl. 1979), and other cases. Appellants claim that they are fully entitled to an award of attorney's fees and expenses under section 203(a)(1) of the EAJA and request a remand of the case to an Administrative Law Judge for a determination of the appropriate award.

[1] Section 203(a)(1) of the EAJA provides that

> [a]n agency that conducts an adversary adjudication shall award, to a prevailing party * * * fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust.

5 U.S.C. § 504(a)(1) (Supp. III 1985). The term "adversary adjudication" is defined in relevant part as an "adjudication under section 554 of [Title 5] in which the position of the United States is presented by counsel or otherwise." 5 U.S.C. § 504(b)(1)(C) (Supp. III 1985).

In promulgating regulations implementing section 203(a)(1) of the EAJA, as noted by Judge Luoma, the Department incorporated a regulation, 43 CFR 4.603(a), which states that "these rules apply to adjudications conducted by the Office of Hearings and Appeals under 5 U.S.C. 554 which are required by statute to be determined on the record after opportunity for an agency hearing." Conversely, 43 CFR 4.603(a) provides that "these rules do not apply where adjudications on the record are not required by statute even though hearings are conducted using procedures comparable to those set forth in 5 U.S.C. 554."

Appellants contend that 43 CFR 4.603(a), as interpreted by Judge Luoma, is contrary to section 203(a)(1) of the EAJA. We disagree. The regulatory interpretation given by Judge Luoma comports with a clear reading of the regulation. Moreover, we conclude that the regulation in turn comports with section 203(a)(1) of the EAJA. See also Benton C. Cavin, 93 IBLA 211, 217 (1986). The statute defines an adversary adjudication as an "adjudication under section 554 of [Title 5]." (Emphasis added.) 5 U.S.C. § 504(b)(1)(C) (Supp. III 1985). Section 554 of Title 5 of the United States Code does not concern all adjudications but applies by its terms, with certain exceptions, only to adjudications "required by statute to be determined on the record after opportunity for an agency hearing." 5 U.S.C. § 554(a) (1982). Section 554, as it applies to covered adjudications, in part mandates the content of a notice of a hearing, requires an opportunity for interested parties to submit facts, arguments, and offers of settlement, provides for a "hearing and decision" in accordance with 5 U.S.C. §§ 556, 557 (1982), and provides that the person "who

presides at the reception of evidence" shall make the initial or recommended decision. 5 U.S.C. § 554 (1982). It is undisputed that, in the interest of affording due process protection to the adjudication of certain property rights, the courts and the Department have extended the procedural prerequisites of section 554 of Title 5 to other adjudications. See Kaycee Bentonite Corp., 79 IBLA 182, 187-90, 91 I.D. 138, 141-43 (1984), and cases cited therein. However, in the absence of evidence of contrary legislative intent, we concluded in Kaycee Bentonite that section 203(a)(1) of the EAJA was not intended to apply to adjudications, including mining claim contests, which were not required by any statute to be determined on the record after opportunity for an agency hearing. Such adjudications might be conducted in accordance with the procedural provisions of section 554 of Title 5 where the courts or the Department regarded the statute as a necessary or useful embodiment of procedural safeguards. However, in those instances, the adjudications could only be said to be "under" the statute by virtue of executive or judicial decision. There is no legislative history which suggests that Congress intended thus to leave the question of what adjudications were covered by section 203(a)(1) of the EAJA in the hands of the courts or the Department, which would decide whether and when to invoke section 554. Rather, the more likely interpretation of the statutory term is that Congress intended to include only adjudications which it had determined, or might later determine, were required to be determined on the record after opportunity for an agency hearing. Indeed, such adjudications are the only adjudications which expressly come "under" the statute. 5 U.S.C. § 504(b)(1)(C) (Supp. III 1985). Appellants have offered no evidence to persuade us otherwise. We, therefore, adhere to our holding in Kaycee Bentonite. See Smedberg Machine & Tool, Inc. v. Donovan, 730 F.2d 1089, 1092 (7th Cir. 1984); Cornella v. Schweiker, 728 F.2d 978, 988 (8th Cir. 1984).

Nevertheless, the next question is whether the adjudication involved herein was required by statute to be determined on the record after opportunity for an agency hearing. Judge Luoma concluded that the "trespass action," where it arose under the Taylor Grazing Act and FLPMA, was not such an adjudication. This finding was made in error.

The District Manager's decisions to assess trespass damages, cancel appellants' existing authorized grazing use, deny appellants' applications for further grazing use authorization, and bar appellants from any future authorized grazing use, were made pursuant to the authority granted to the Secretary under the Taylor Grazing Act and FLPMA to administer grazing use on public lands. We can find nothing in either of those statutes which expressly requires that adjudications thereunder be on the record after opportunity for an agency hearing. However, section 9 of the Taylor Grazing Act, as amended, 43 U.S.C. § 315h (1982), requires that the Secretary "shall provide by appropriate rules and regulations for local hearings on appeals from the decisions of the administrative officer in charge in a manner similar to the procedure in the land department." That statutory provision applies generally to "matters that arise in the administration of grazing districts." LaRue v. Udall, 324 F.2d 428, 432 (D.C. Cir. 1963), cert. denied, 376 U.S. 907 (1964). Accordingly, it is applicable here. Moreover, section 9 of the

Taylor Grazing Act clearly requires the Secretary to provide not only for "appeals" but also an "opportunity for an agency hearing" with respect to decisions involving administration of grazing districts.

Indeed, shortly after enactment of the Taylor Grazing Act, the Department promulgated "rules and regulations" providing for an opportunity for an agency hearing as well as appeals to the Secretary. See Circular No. 4, 55 I.D. 368 (Oct. 7, 1935). In addition, it naturally follows that section 9 of the Taylor Grazing Act requires that adjudication of such appeals be on the record, whether that developed at the hearing or generally before the Department. Indeed, the above-mentioned "rules and regulations" also provide for transmittal of "the record" to the Secretary for decision. Circular No. 4., supra at 369. Thus, we conclude that the adjudication here is governed by section 9 of the Taylor Grazing Act, is required to be determined on the record after opportunity for an agency hearing, and thus is subject to section 203(a)(1) of the EAJA.

[2] This raises the question whether appellants are entitled to an award of attorney's fees and expenses under section 203(a)(1) of the EAJA. There is no question that appellants are the "prevailing party" in the present adjudication, within the meaning of section 203(a)(1) of the EAJA. Nevertheless, we conclude that appellants are not entitled to an award because the administrative record as a whole establishes that BLM was "substantially justified" in assessing trespass damages and in taking the other related action in response to its determination that appellants had permitted excess numbers of cattle to graze in trespass on public land. 5 U.S.C. § 504 (Supp. III 1985).

We start with the proposition that BLM will not be held to have acted without substantial justification merely because it lost in an administrative adjudication. As was observed in Kaycee Bentonite Corp., supra at 195, 91 I.D. at 145, that is the interpretation of the statute taken from its legislative history. Moreover, that legislative history also provides that, in order to establish substantial justification, BLM need not demonstrate that it acted "based on a substantial probability of prevailing." H.R. Rep. No. 1418, 96th Cong., 2d Sess. 11, reprinted in 1980 U.S. Cong. Code & Ad. News 4990. All that must be established is that BLM's case had a "'reasonable basis both in law and fact.'" S&H Riggers & Erectors, Inc. v. O.S.H.R.C., 672 F.2d 426, 430 (5th Cir. 1982) (quoting from H.R. Rep. No. 1418, 96th Cong., 2d Sess. 11, reprinted in 1980 U.S. Code Cong. & Ad. News 4989). See also Grand Boulevard Improvement Association v. City of Chicago, 553 F. Supp. 1154, 1161 (N.D. Ill. 1982).

In Kaycee Bentonite, we concluded that BLM will not be held to have acted without substantial justification merely because the appellant ultimately overcame, by preponderance of the evidence, BLM's prima facie case that the bentonite on the appellant's claims was subject to location under the mining laws. Likewise, in the present case, we conclude that BLM did not act without substantial justification merely because BLM failed to establish, by substantial evidence, the existence of a trespass. Kirkland v. Railroad Retirement Board, 706 F.2d 99, 104 (2d Cir. 1983) (Board's findings not

supported by "substantial evidence" - no EAJA award). Indeed, we do not regard the question of substantial justification as resolvable at all on the basis of whether BLM or an appellant has ultimately satisfied its burden of proof. There is no indication this is what Congress intended. Moreover, the question of whether BLM was substantially justified is distinguished by the language of the statute from the question of whether the appellant has prevailed. Indeed, you reach the question of substantial justification following a determination that the appellant is the "prevailing party." Simply said, BLM may have been "substantially justified" in taking an action even where its action was not ultimately vindicated by the evidence adduced at the hearing under the relevant standard of proof. That is the situation here.

In the present case, BLM had undisputed evidence that appellants were grazing cattle in excess of the numbers authorized by its BLM-issued grazing permits. Appellants did not deny that fact. Rather, they argued that such cattle were grazed on private land adjacent to the public land where BLM believed the cattle to be grazing. While BLM had no eyewitness reports to dispute appellants' claim, BLM nonetheless concluded that circumstantial evidence supported its decision to pursue trespass charges and related action against appellants. Such evidence consisted of BLM's determination, based on expert analysis and interviews with the private landowners, that the forage available on the private land was inadequate to sustain the excess numbers of cattle during the periods of time appellants allegedly grazed that land and that, therefore, the cattle must necessarily have been grazed on public land.

Obviously, eyewitness reports that excess numbers of cattle were grazed by appellants on public land would have made for a stronger case. However, if those reports were determined on appeal to be unreliable, would we then say that BLM had not been substantially justified in pursuing its trespass charges and related action against appellants? The answer would be no. Conversely, we cannot say that BLM was not substantially justified in taking the action it did where it relied on circumstantial evidence, which if proven, would have established that appellants must necessarily have grazed excess numbers of cattle on public land.

Moreover, we decline to make a finding of lack of substantial justification where our decision in BLM v. Ericsson, supra at 258, hinged on a narrow evidentiary base, which depended solely on Judge Luoma's assessment of the credibility of appellants' witnesses and the adequacy of BLM's presentation of its case. In Ericsson, we were unwilling to overturn Judge Luoma's determinations that the adjacent private land contained adequate forage to sustain the excess numbers of cattle and that the cattle were in fact grazed on this land, which determinations were based on an assessment of the credibility of appellants' witnesses and BLM's failure to fully develop its evidence to the contrary. Rather, however we regard BLM's presentation of its case at the hearing, we conclude that BLM's position that appellants had trespassed on public land had a reasonable basis in fact and was, therefore, substantially justified. Indeed, we do not regard BLM's failure at the hearing as having any bearing on whether it was substantially justified in pursuing the case. Likewise, we do not regard Judge Luoma's assessment of credibility

at the hearing as having any bearing on whether BLM was substantially justified in pursuing the trespass charges and related action. The question of substantial justification concerns only whether BLM had information available to it, looking at that information as a whole, which substantially justified pursuit of the case. We conclude that the circumstantial evidence met that criterion. 2/ There is also no evidence that BLM acted in bad faith or with the aim of harassing appellants.

Finally, we conclude that to hold that BLM was not substantially justified would deter BLM from pursuing vigorous enforcement efforts and subsequent hearings and appeals in similar cases where the evidence strongly points to unauthorized grazing use but BLM, whether through its own fault or not, is ultimately unable to prevail. This was clearly not the purpose of section 203(a)(1) of the EAJA. Indeed, as the legislative history of the statute points out, the standard of "substantial justification" was inserted in the statute in order to counterbalance the primary thrust of the statute, which was to encourage parties to vindicate their rights, by also protecting the "'constitutional obligation of the executive branch to see that the laws are faithfully executed.'" S & H Riggers & Erectors, Inc. v. O.S.H.R.C., supra at 429-30 (quoting from H.R. Rep. No. 1418, 96th Cong., 2d Sess. 10, reprinted in 1980 U.S. Code Cong. & Ad. News 4989). For these reasons, we conclude that appellants are not entitled to an award of attorney's fees and expenses pursuant to section 203(a)(1) of the EAJA and that Judge Luoma properly denied appellants' EAJA application.

2/ We note that A. J. Burski, in his separate opinion in Ericsson, characterized BLM's position at the time it initiated the actions involved herein simply as a "matter of logic":

"If Ericsson admitted that he had cattle greatly in excess of his permitted use during the years in question, and if interviews with various individuals indicated that, contrary to the list submitted by Ericsson, they had nowhere near the number of steers which Ericsson alleged on their private lands, one need only glance at a map of the area (Exh. 1) to conclude that if they weren't where Ericsson said they were, they were probably on the Federal range."

BLM v. Ericsson, supra at 265 (Burski, A.J. concurring in part and dissenting in part). Moreover, A. J. Burski was of the opinion that the evidence adduced at the hearing supported at least one finding of willful trespass:

"Based on my examination of the entire record, I do not find it credible that numerous trips down the El Paso pipeline with the number of cattle involved could have occurred without either of the Hilbrands, or Hutchinson or Cole having seen or been made aware of the crossings. Thus, I must conclude that no cattle were grazed on Kemper Brown's ranch, and I think it entirely in accord with logic to further conclude that the 2,500 to 3,000 head of cattle were, in fact, willfully trespassed on the Federal range. I would assess trespass damages for these cattle." Id. at 266.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified.

Franklin D. Arness
Administrative Judge

I concur:

Gail M. Frazier
Administrative Judge

ADMINISTRATIVE JUDGE BURSKI CONCURRING:

I agree with the majority's conclusion that grazing trespass actions arising within grazing districts constitute proceedings required to be determined on the record after an opportunity for agency hearing as required by 43 CFR 4.603(a) for an award under the Equal Access To Justice Act (EAJA), 5 U.S.C. § 504 (Supp. III 1985). Thus, I agree that Judge Luoma erred, as a matter of law, in holding that an award of attorney fees and other expenses under the EAJA was precluded, in the instant case, by the Department's regulations.

I also agree, however, that appellants have failed to show that the Government's position was not "substantially justified." I write separately to underline the fact that my conclusion on this point is not premised on my continued belief that the evidence did, indeed, establish that a trespass had occurred. See United States v. Ericsson, 88 IBLA 248, 261-67 (1985) (dissenting opinion). In examining whether a party has the right to fees under the EAJA, I think it incumbent upon all members of the panel to approach the issue from the assumption that the majority was correct in its determination. But, even viewed in this light, I think it clear that the position of BLM was substantially justified.

The majority approached this case as one in which findings of credibility were determinative and thus placed, to my mind, inordinate reliance on the decision of Judge Luoma. In view of this, it is useful to recall exactly what Judge Luoma found. Judge Luoma merely found that the private lands were fenced and that they contained sufficient forage to support the Ericssons' cattle. He did not find that the cattle were actually grazed on private lands, he merely found that the Government had failed to prove that they were not grazed there. Thus, even Judge Luoma eschewed a declaration that the cattle were grazed in the private pastures as appellants asserted.

When this fact is conjoined with the existence of admittedly contradictory prior statements made to BLM by Bonnie Ericsson and Billy Roer, which were ultimately retracted at the hearing, I find it impossible to criticize, in any way, BLM's decision to issue the show cause notice and proceed with the hearing. BLM should not be faulted for lacking the foreknowledge that various witnesses would repudiate prior assertions. I think the refusal of the majority to award fees under the EAJA is eminently correct.

James L. Burski
Administrative Judge.